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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN JOSE DIVISION**

15 MAXIMILIAN KLEIN and SARAH GRABERT,
16 individually and on behalf of all others similarly
17 situated,

18 Plaintiffs,

19 v.

20 FACEBOOK, INC., a Delaware corporation,

21 Defendant.

Case No. 5:20-cv-08570-LHK

22 **JOINT MOTION FOR**
23 **ADMINISTRATIVE RELIEF TO**
24 **CONSIDER WHETHER CASES**
25 **SHOULD BE RELATED PURSUANT**
26 **TO CIVIL L.R. 3-12**

27 Judge: Hon. Lucy H. Koh

1 Pursuant to Civil Local Rule 3-12, defendant Facebook, Inc. and Plaintiffs in *Loveland et*
 2 *al. v. Facebook et al.*, 3:21-cv-03300-CRB, respectfully move the Court to relate *Loveland* to
 3 *Klein v. Facebook, Inc.*, No. 5:20-cv-08570-LHK. The *Klein* User and Advertiser plaintiffs take
 4 no position on whether the cases should be related. A declaration from David Z. Gringer
 5 accompanies this motion.

6 **I. BACKGROUND**

7 Between December 8, 2020 and March 23, 2021, 11 complaints were filed in this
 8 District, all alleging that Facebook has monopolized or attempted to monopolize certain alleged
 9 markets in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2.¹ In a series of decisions,
 10 this Court related and consolidated the cases. *See* Dkt. 47, 50, 68, 74, 85. The Court ordered the
 11 plaintiffs to file two consolidated complaints, one by plaintiffs who advertised with Facebook
 12 (the “Advertisers”) and one by Facebook users (the “Users”). *See* Dkt. 74. On April 22, 2021,
 13 Users and Advertisers filed consolidated complaints.² *See* Dkt. 86, 87.

14 In the midst of the filing of these complaints, Plaintiffs in *Loveland* filed their complaint
 15 in the Eastern District of Pennsylvania. *See* No. 2:20-cv-06260-JMY, Dkt. 1 (E.D. Pa. Dec. 11,
 16 2020). In relevant part, the complaint alleged two causes of action alleging that Facebook
 17 unlawfully monopolized the “social network” market. Facebook’s terms of service require that
 18 any claim arising out of the use of Facebook’s platform “will be resolved exclusively in the U.S.
 19 District Court for the Northern District of California or a state court located in San Mateo
 20 County.” *See, e.g., id.*, Dkt. 12-3. Pursuant to these terms, Facebook moved to transfer the
 21 *Loveland* case to the Northern District of California. *See id.*, Dkt. 12. The court granted
 22 Facebook’s motion over Plaintiffs’ objection. *See id.*, Dkt. 22.

23

24 ¹ A twelfth case, originally filed in California state court and then removed to the Northern
 25 District of California, alleges that Facebook has unlawfully maintained a monopoly in violation
 26 of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200. *See Rosenman v.*
Facebook, Inc., No. 21-cv-02108 (N.D. Cal. filed Mar. 25, 2021). A motion for remand is
 27 pending before this Court.

28 ² Facebook has moved to dismiss the complaints; briefing is completed, and a hearing was held
 on July 15.

1 Recognizing that the antitrust claims were similar to those in *Klein* and distinct from
 2 *Loveland* Plaintiffs' other causes of action, Facebook and *Loveland* Plaintiffs agreed to sever the
 3 antitrust claims. *See* No. 3:21-cv-03300-CRB, Dkt. 40. On June 25, Judge Breyer granted the
 4 parties' stipulation. *See id.*, Dkt. 41. On July 26, *Loveland* plaintiffs filed their new antitrust
 5 complaint ("*Loveland* Complaint"), *id.*, Dkt. 42, and moved to dismiss the Constitutional, RICO,
 6 and state law claims, *id.*, Dkt. 43. On August 1, Plaintiffs voluntarily dismissed their non-
 7 antitrust claims, *id.*, Dkt. 45. The *Loveland* Complaint now alleges only antitrust violations via
 8 monopolization and attempted monopolization of alleged "social network" and "social media"
 9 markets, *id.*, Dkt. 42.

10 **II. LOVELAND SHOULD BE RELATED TO KLEIN**

11 Under Civil Local Rule 3-12(a), actions are related "when: (1) The actions concern
 12 substantially the same parties, property, transaction or event; and (2) It appears likely that there
 13 will be an unduly burdensome duplication of labor and expense or conflicting results if the cases
 14 are conducted before different Judges." That standard is easily met here. Both cases focus on
 15 Facebook's alleged deception of users, its acquisitions of purported nascent competitors, and its
 16 regulation of access to its platform. In light of the substantial factual and legal overlap, and the
 17 threat of duplicative discovery and inconsistent judgments without relation and consolidation,
 18 *Loveland* and *Klein* exceed the relevant standard for relation.

19 *First*, the cases both "concern substantially the same parties, property, transaction or
 20 event." Civil L.R. 3-12(a)(2)(1). The cases involve ***substantially the same parties***. Facebook is
 21 the defendant in both cases. *Loveland* Plaintiffs, who are themselves Facebook users, fall within
 22 the putative User Class in *Klein*, which includes "All persons in the United States who
 23 maintained a Facebook profile at any point from 2007 up to the date of the filing of this action."
 24 Dkt. 87, User Compl. ¶ 248. *See Loveland* Complaint ¶ 15 ("Plaintiff Sally Loveland. . . joined
 25 Facebook in or about 2009."); *id.* ¶ 16 ("Sharon Chatle. . . joined Facebook in or about 2009.");
 26 *id.* ¶ 17 ("Cortese joined HAN [Facebook group] in June 2020.").

27 The cases also concern ***substantially the same transactions and events***. Both cases
 28

1 allege that Facebook unlawfully monopolized or attempted to monopolize *the same markets*—
 2 purported “social network” and “social media” markets—in violation of Section 2 of the
 3 Sherman Act, 15 U.S.C. § 2. *Compare* User Compl. ¶ 261 (“Facebook has willfully acquired
 4 and maintained monopoly power in the relevant Social Network Market.”), *with Loveland*
 5 Compl. ¶ 48 (“Facebook has willfully acquired and maintained monopoly power in the relevant
 6 Social Network Market.”); *compare also* User Compl. ¶ 285 (“Facebook has willfully acquired
 7 and maintained monopoly power in the relevant Social Media Market.”), *with Loveland* Compl.
 8 ¶ 71 (“Facebook has willfully acquired and maintained monopoly power in the relevant Social
 9 Media Market.”).

10 Both sets of plaintiffs allege that Facebook acquired and maintained monopoly power in
 11 the two markets through the *same conduct*. *See Zakinov v. Ripple Labs, Inc.*, No. 18-CV-06753-
 12 PJH, 2020 WL 2768966, at *2 (N.D. Cal. May 28, 2020) (relating cases making “materially
 13 identical allegations of misconduct”). At the heart of both *Loveland* Plaintiffs’ and Users’
 14 monopolization theory is that Facebook allegedly deceived consumers about its privacy practices
 15 and use of their data. *Compare Loveland* Compl. ¶ 29 (“Through its deception, Facebook
 16 prevented competition on the merits When agreeing to Facebook’s Terms of Service,
 17 consumers agree to give up things of material value. Facebook then sold its users’ information,
 18 and attention to third parties, including advertisers.”), *with* User Compl. ¶ 116 (“Despite
 19 claiming to provide users with enhanced privacy protections, however, Facebook increasingly
 20 made user data available to advertisers without disclosure to users. Facebook’s unrelenting
 21 deception of its users allowed Facebook to continue to amass market share in the Social Network
 22 and Social Media Markets.”).

23 The two complaints also both allege that Facebook acquired nascent competitive threats
 24 and that Facebook excluded competitors from using its platform by regulating access to its APIs.
 25 *Compare Loveland* Compl. ¶ 24 (“Facebook has also maintained and expanded its dominance
 26 through a series of acquisitions of companies it viewed as competitive threats, and selectively
 27 excluded competitors from using its platform to insulate itself from competitive pressure.”), *with*

1 User Compl. ¶ 156 (“Facebook also sought to protect and expand its monopolies by regularly
 2 destroying and acquiring competitive threats, and it used its market power and data advantage to
 3 anticompetitively achieve its monopolistic objectives.”).

4 The theories of antitrust injury are also identical. *Compare Loveland Compl.* ¶ 30
 5 (“Absent Defendant Facebook’s anticompetitive conduct which has eliminated, competition,
 6 consumers would have benefited from more robust competition in terms of non-price attributes
 7 such as data privacy practices and social media platform quality.”), *with* User Compl. ¶ 220
 8 (“Because Facebook anticompetitively restrained competition in its efforts to acquire and obtain
 9 social media and social network monopolies, competition along the dimensions of user privacy
 10 and product quality was foreclosed.”).

11 This substantial overlap in the allegations in the two cases warrants relation. *See Jam*
 12 *Cellars, Inc. v. Wine Grp. LLC*, No. 19-CV-01878-HSG, 2020 WL 2322992, at *1 (N.D. Cal.
 13 May 11, 2020) (relating cases involving “same underlying legal claims”); *Pepper v. Apple Inc.*,
 14 No. 11-CV-06714-YGR, 2019 WL 4783951, at *1 (N.D. Cal. Aug. 22, 2019) (relating cases
 15 “underlined by the same operative facts—Apple’s alleged monopolization of the distribution and
 16 sale of iPhone apps.”).

17 **Second**, given the substantial factual and legal overlap between the cases, it is “likely
 18 that there will be an unduly burdensome duplication of labor and expense … if the cases are
 19 conducted before different Judges.” Civil L.R. 3-12(a)(2). Because both of these cases involve
 20 the same activity and substantially the same legal theories, any discovery, motion practice, trials,
 21 and potential remedies will substantially overlap. *See Pepper*, 2019 WL 4783951, at *2. At the
 22 center of both of these cases will be an examination of the alleged relevant markets, an
 23 assessment of whether Facebook has monopoly power in the markets alleged, Facebook’s
 24 conduct in the relevant markets, including the competitive effects of the challenged acquisitions
 25 and Facebook’s legitimate business justifications for that conduct, Facebook’s treatment of user
 26 data, and Facebook’s API practices. Moreover, the parties anticipate that substantial efficiencies
 27 will be available in discovery into each of these theories if these cases are related. In contrast, it
 28

1 would be inefficient and unduly burdensome to “hav[e] ... different judges govern discovery
 2 disputes.” *Financial Fusion, Inc. v. Ablaise Ltd.*, 2006 WL 3734292, at *3 (N.D. Cal. Dec. 18,
 3 2006).

4 **Third**, absent relation, there is a serious risk “of conflicting results.” *See Civil L.R. 3-*
 5 12(a). For example, different courts could reach different conclusions about the viability of the
 6 alleged “social network” and “social media” markets or the contours of those markets. Facebook
 7 also anticipates raising similar defenses to the *Loveland* antitrust allegations as it has raised in
 8 *Klein*, including that the claims are untimely and that the plaintiffs have failed to plausibly allege
 9 exclusionary conduct. Not only might two judges make inconsistent decisions on the same legal
 10 issues, but because *Loveland* Plaintiffs belong to the *Klein* putative User Class, their same claims
 11 could be dismissed in one case and survive in another—which would of course be an
 12 irreconcilable result. Further, “the fact that both sets of plaintiffs seek injunctive relief presents a
 13 sufficient risk of inconsistent results to warrant relation.” *Pepper*, 2019 WL 4783951, at *2.

14 This Court has already related and consolidated many cases raising these same claims.
 15 *See* Dkt. 47, 50, 68, 74, 85. Because of the substantial overlap between *Loveland* and those
 16 cases, Facebook and *Loveland* Plaintiffs respectfully request that the Court enter an order
 17 relating *Loveland* to *Klein*.

19 Dated: August 18, 2021

Respectfully submitted,

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19 *03300-CRB*

SIGNATURE ATTESTATION

I am the ECF User whose identification and password are being used to file the foregoing. Pursuant to Civil Local Rule 5-1(i), I hereby attest that the other signatories have concurred in this filing.

Dated: August 18, 2021

/s/ Sonal N. Mehta

Sonal N. Mehta

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August 2021, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System. And I hereby certify that I have served the foregoing document on counsel for the plaintiffs in the action in which relation is sought pursuant to agreement between the parties.

/s/ Sonal N. Mehta
Sonal N. Mehta